



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL. 6 OF 2017

ISAAC WAINAINA.....APPLICANTS

- VERSUS-

ALEXANDER MUTUA KISULI (Suing as Legal

Representative of the Estate of the Late

RUTH KANINI MUTUA-DECEASED).....RESPONDENT

RULING

1. This matter has a chequered history. On 7th October, 2021, I directed that the application dated 5th October, 2020 be served for further orders on 27th October, 2020. That application was seeking that leave be granted to the firm of Kimondo Gachoka & Co. Advocates to come on record in place of Kairu and McCourt Advocates for the Appellants. It also sought that the incoming firm replaces the outgoing firm as a signatory to the joint account opened in the names of the firm of Kairu and McCourt Advocates and Fred Mwhia & Company Advocates.
2. On 27th October, 2020, there was no appearance for either of the parties and the said application was dismissed. Subsequently, by an application dated 26th May, 2021, the Respondents sought to have this appeal dismissed for want of prosecution and for the vacation of the orders of stay granted on 18th November, 2016 and the release of the sum deposited in the joint account.
3. On 27th July, 2021, this court directed the Appellant to file and serve the record of appeal within 30 days and in default the appeal to stand dismissed with costs. That order was not complied with since by an application dated 29th November, 2021, the Appellant sought orders that the appeal be reinstated for hearing and determination. The said application is based on the fact that the appellant has not been able to get the proceedings to enable them file the record of appeal.
4. In this case it is clear that this appeal stood dismissed on 27th August, 2021. It took another two months after the deeming date for this application to be made. It is contended that the advocates for the appellants did not learn of the dismissal immediately and were unknowingly following up the proceedings even after the dismissal.
5. I have considered this application. From the history of this matter, it is clear that the appellant has been lethargic in pursuing this clearly old appeal. The reason why the application seeking to dismiss the appeal for want of prosecution was shelved was because the Appellants indicated that they were pursuing the appeal. Indulgence was extended to them but they seemed not to have taken that indulgence seriously. An order extending the indulgence was made in the presence of the Appellant's counsel. They however contend that they were unaware of the effect of non-compliance. They took two months to make an application for extension of time without any convincing reason. It is noteworthy that the said application is itself dated 16th November, 2021.
6. The decision whether or not to set aside an order dismissing an application is an exercise of discretion and like any other discretion must be exercised upon reason and must not be capriciously done or done on the whims. See **Masefield Trading (K) Ltd. vs. Francis M Kibui Nairobi (Milimani) HCCC No. 1796 of 2000 [2001] 2 EA 431.**
7. In the absence of a satisfactory explanation justifying failure to comply with the Court's directions, I find no merit in the application dated 16th November, 2021 which I hereby dismiss but with no order as to costs due to non-compliance with the Court's directions by the Respondent.
8. For avoidance of doubt this appeal stands dismissed and the amount deposited in the joint account on account of this appeal is hereby

directed to be released to the Respondent's advocates.

9. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 21ST DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Thairu for the Applicant

Mr Muhia for the Respondent

CA Susan